ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of US West Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	And Consolidated Dockets

COMMENTS OF RHYTHMS NETCONNECTIONS INC.

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SUMMARY

The fundamental question in this proceeding is a relatively narrow one — whether incumbent LECs must provide interconnection under Section 251(c)(2) for CLECs that offer xDSL-based advanced services. The Commission's initial conclusion was properly based on both the plain language of the 1996 Act as well as Congress's clear intent to promote of competition in all telecommunications services that use local network facilities. DSL services plainly satisfy the requirements for Section 251(c) interconnection. The Commission must recognize, however, that, regardless of its finding on this issue, this inquiry is irrelevant to, and therefore cannot abrogate or limit, ILEC unbundling or collocation obligations under the separate and distinct provisions in Section 251.

The ILECs' argument that DSL services are exempt from Section 251 because they are "information" services rather than "telecommunications" services is meritless. The 1996 Act does not differentiate between circuit-switched telephony and more advanced forms of packet-switched telecommunications. Nor should it. Adopting the cramped approach advocated by US West would not only overturn decades of settled Commission precedent, such as the decisions holding that frame relay and other data transport services are basic telecommunications, but would directly contradict the Act's technology-neutral policies. Congress did not intend that the regulatory classification of telecommunications services should hinge on the nature of the underlying telecommunications infrastructure. In an era of rapid technological change, the ILECs' position would supercede the central provisions of the 1996 Act by making application of the Act hinge on whether carriers utilize traditional circuit-switched telephony or some other technology for serving customers.

The Commission's analysis of xDSL-based services as interstate special access services largely resolves the issue of whether advanced services are entitled to interconnection under Section 251(c)(2). According to both the record and the Commission's holdings in the *GTE DSL Orders*, DSL services are special access services that are subject to exclusive federal jurisdiction under the "mixed use" rule. When deployed, as by Rhythms and other DSL providers, as a dedicated connection to the global "network of networks" of the Internet, DSL is plainly a form of exchange access service because it provides for the origination and termination of a customer's interstate and international communications. By separating the transport function of DSL from the content-based Internet and data services it supports — that is, in networking terms, separating the DSL "pipe" from the Internet "cloud" — the Commission can rely on its special access rules to apply Section 251 to DSL-based advanced services. Thus, because DSL special access are "exchange access services," DSL providers are entitled to nondiscriminatory access to interconnection under Section 251(c)(2).

In addition, the Commission has clear authority under Section 706 of the 1996 Act to adopt local competition rules issued pursuant to Section 251 in order to promote the deployment of advanced services. The plain language of Section 706 both requires the Commission to facilitate the development of advanced services, most prominently today DSL, by imposing market-opening obligations on incumbents in a manner similar to the measures provided in Section 251. Nothing in Section 706 limits or qualifies the services for which such measures may be adopted. Therefore, even absent a finding that DSL-based advanced services fall within Section 251(c)(2), the Commission has the jurisdiction and authority to promulgate interconnection rules to promote competition in the broadband advanced services marketplace.

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COMMENTS OF
RHYTHMS NETCONNECTIONS INC.

Rhythms NetConnections Inc. ("Rhythms"), by its attorneys, submits these comments in response to the Commission's *Public Notice*[1] seeking comment on the jurisdictional classification of Digital Subscribe Line ("DSL") advanced services, namely whether DSL services are telephone exchange services or exchange access services for purposes of Section 251 of the Telecommunications Act of 1996.[2]

DSL is unmistakably a telecommunications service. DSL is a transmission technology that changes neither the form nor content of the communication sent or received. Thus, as a telecommunications service, the 1996 Act requirements for unbundling and collocation apply to DSL. Furthermore, Section 251(c) does not restrict its interconnection guarantee to any particular form of telecommunications. DSL easily meets the Act's definition of "exchange access"

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[1] *Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*, DA 99-1853, CC Dockets Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, Public Notice (rel. Sept. 9, 1999).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act" or "Act").

in order to qualify for interconnection; any contrary holding would pervert the 1996 Act's technology-neutral scheme, overturn settled Commission precedent and make application of the Act hinge solely on the unilateral network technology choices made by carriers in a rapidly changing market in which, as the Commission recognizes, all telecommunications are becoming digital. In short, the US West position would do more than pervert the 1996's purposes, it would make the Act a dead letter as a result of the very fervent of technological development and competition that the Act was designed to spur.

INTRODUCTION

On August 7, 1998, the Commission issued its *Advanced Services Memorandum Opinion and Order*[3] as a first step in a series of efforts to foster a competitive market in advanced services, and to carry out its obligations under Section 706 of the Act to ensure the reasonable and timely deployment of advanced telecommunications capability to all Americans. The FCC's decision was in part a response to four petitions filed by Regional Bell Operating Companies seeking the FCC's permission to offer advanced services, namely xDSL services, in a deregulated environment without the obligations of Section 251 of the Act.[4] In that Order, the Commission determined that DSL services are telecommunications services covered by Section 251 of

[3] *In the Mater of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion and Order, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 (rel. Aug. 7, 1998) ("Advanced Services Order").

[4] *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed Jan. 26, 1998); *Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket 98-26 (filed Feb. 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability*, CC Docket No. 98-32 (filed March. 5, 1998); *Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91 (filed June, 9, 1998).

the Act because, consistent with the Act's definition of telecommunications services,[5] they do not change the form or content of the information received or sent.[6]

Applying the Act's definitions of "telephone exchange service" and "exchange access", the Commission determined that the incumbent LECs' DSL services were subject to the interconnection requirements of the Act because DSL services are either telephone exchange service or exchange access.[7] The Commission, declined, however, to decide under which of these two categories, DSL services fell, noting related ongoing proceedings on the jurisdictional nature of DSL services raised by the DSL tariffs of several incumbent LECs filed as special access services at the Commission.[8] (Since the *Advanced Services Order*, the Commission has reiterated in other proceedings, including its DSL tariffing[9] and access charges dockets,[10] that DSL services are telecommunications services.)

In response to the *Advanced Services Order*, US West filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit, arguing among other things that the

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[5] Telecommunications services are defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[6] *Advanced Services Order* ¶ 35.

[7] *Advanced Services Order* ¶ 38. The 1996 defines a telephone exchange service as a "service within a telephone exchange, or within a connected system of telephone exchanges within the same area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange," or "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. §153(47). Exchange access services are defined as "access to telephone exchange services *or* facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). Telephone toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange services." 47 U.S.C. § 153(8).

[8] *Advanced Services Order* ¶ 40.

[9] *GTE Telephone Operating Co, GTOC Tariff No. 1 GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order (rel. Oct. 30, 1998) ("GTE DSL Order") (finding that DSL services are interstate telecommunications services properly tariffed at the federal level). *Bell Atlantic Telephone Cos. Bell Atlantic Tariff No. 1 Bell Atlantic Transmittal No. 1076*, CC Docket No. 98-168, *BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476*, CC Docket No. 98-161, *GTE System Telephone Cos. GSTC FCC Tariff No. 1 GSTC Transmittal No. 260*. CC Docket 98-167, *Pacific Bell Telephone Co. Pacific Bell Tariff NO. 128 Pacific Bell Transmittal No. 1986*, CC Docket No. 98-103, Memorandum Opinion and Order (rel. Nov. 30, 1998).

FCC "gave no reason why either definition [telephone exchange services or exchange access] covers DSL services" and "did not articulate any interpretation of the relevant statutory terms whatsoever."[11] Instead, US West further argued, "the FCC merely stated that it disagreed with US West's construction of the Act."[12] US West did not engage in any specific analysis of the issue of whether or not DSL is a telecommunications service, but rather maintained that because the data services offered by ISPs are information services rather than basic telecommunications, DSL services must be information services as well, and DSL access is really information access.[13]

To consider these issues further, the FCC requested a voluntary remand of its decision in order to have "the opportunity to consider further the issues raised by US West because some of the statutory construction arguments advanced by US West . . . had been presented only summarily and in truncated form before the agency."[14] Specifically, the Commission asked several general questions, including whether or not DSL services are telephone exchange services or exchange access services,[15] and whether, and to what extent, Section 251(c) of the Act applies to incumbent DSL services.[16]

I. DSL IS UNQUESTIONABLY A TELECOMMUNICATIONS SERVICE

The Commission correctly concluded that DSL is a telecommunications service that is subject to the strictures of Section 251(c). The first critical inquiry for assessing the applicability

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[10] *Access Charge Reform*, Fifth Report and Order, CC Docket Nos. 96-262, 94-1, 98-63, 98-157 ¶ 100 n.280 (rel. Aug. 27, 1999) (citing the Commission's decision that DSL services are special access services and thus are subject to special access pricing rules on pricing flexibility).

[11] Petitioner's Brief, *US West Communications, Inc., v. FCC et al.*, No. 98-1410 (D.C. Cir. filed May 17, 1999) ("Petitioner's Brief") at 13.

[12] *Id.* at 14.

[13] Petitioner's Brief at 29.

[14] Public Notice at 1.

[15] Public Notice at 2 ¶ 1.

[16] Public Notice at 2 ¶ 4.

of Section 251 to the services of incumbent LECs[17] is whether or not an entity is providing telecommunications or information services, as telecommunications carriers have access rights under Section 251 and information service providers do not. Moreover, as the Commission properly recognized,[18] while Section 251 addresses the availability of collocation, unbundled network elements, interconnection and resale, only the interconnection provisions predicate that access on a more specific limitation to local exchange or exchange access telecommunications services.

A. DSL Services By Their Technical Nature Are Telecommunications Services

The 1996 Act defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."[19] The focus of determining whether a service is a telecommunications service is on the impact of that service on the information that it carries, and does not turn on the facilities or network technology used to carry that information. As the Commission has squarely held, "[t]his functional approach is consistent with Congress's direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite or some other infrastructure."[20]

Instead of focusing on the facilities used, it is more appropriate to focus on the nature of the service. The jurisdictional classification of a communications service "depends rather on the nature of the service being offered to customers."[21] Moreover, "[i]f the user can receive nothing

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[17] The obligations of Section 251 hinge first and foremost on a carriers classification as an incumbent LEC. The section is predicated more on ensuring that the incumbent LECs provide certain access, rather than on the type of services that carriers seek to use that access to provide.

[18] *Advanced Services Order* ¶ 38.

[19] 47 U.S.C. 153(43).

[20] *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No, 96-45 (rel. April 10, 1998) ("Stevens Report") ¶ 59.

[21] Steven's Report ¶ 59.

more than pure transmission, the service is a telecommunications service."[22] Specifically, if there is no change in the form or content of that information, then the service carrying that information or data is a telecommunications service. This classification is in contrast to information services,[23] which offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[24]

Based upon these definitions, DSL falls squarely under the definition of telecommunications services. DSL services provide dedicated, high-speed services to users, utilizing a plain copper telephone wire that is connected to the user's premises via a DSL modem and, at the other end, to the providers' equipment in the central office or an ISPs POP. Users transmit data, and in some instances, voice over copper lines enabled by DSL technology; the real difference between their DSL technology and transport using an ordinary copper loop is raw speed, which can range as high as 7.1 Mbps.

The data and voice information that users send over DSL-enabled lines is not any different in form upon its arrival than that its form upon dispatch. It arrives as the same data and or voice file. Moreover, this information is not any different in its content, as the same content that is sent, is also delivered. Accordingly, because this information neither changes in form or content, the DSL services that enable this information to arrive, albeit in a extremely fast fashion, are clearly telecommunications services.

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[22] Steven's Report ¶ 59.

[23] "The 1996 Act's distinction between 'telecommunications' and information' services, and the differing regulatory consequences that attach, largely carries forward the 'basic' versus 'enhanced' distinction created by the Commission during the course of its *Computer Inquiry* proceedings, beginning in the later 1960s." Internet Over Cable: Defining the Future in Terms of the Past, 7 Comm Law Conspectus 37 (1998) *See Implementation of the Non-Accounting Safeguards of Sections 272 and 272 of the Communications Act of 1934,* First Report and Order, 11 FCC Rcd 21905, 21955 (1996) (finding that the services previously considered "enhanced" by the Commission are information services.)

[24] 47 U.S.C. 153(20).

B. Incumbent LECs Have Already Conceded By Their Regulatory Positions That DSL Services are Telecommunications Services

Incumbent LECs have conceded that DSL services are telecommunications services in numerous instances. First, several incumbent LECs, including US West, filed to tariff their DSL services as special access services at the FCC. As these carriers well know, only telecommunications services are tariffed by the Commission, as there are no tariffing obligations for information service providers. If there was anyway that these carriers could avoid tariffing requirements (including the pricing review by the FCC), as well as the contentious proceedings that resulted from the filing of these tariffs, surely these carriers would have. But the fact of the matter is that they could not, as they were providing telecommunications services via DSL and thus were subject to the FCC's tariffing requirements and review.

Not only did incumbent LECs tariff their DSL services as interstate telecommunications service subject to a special access regime, but several expressly defended these services as such in support of other incumbent carriers' DSL tariffs. Pacific Bell and SBC have both argued that DSL is a special access service falling under exchange access services. In defending its DSL service tariffed as a special access service at the FCC, Pacific Bell stated that "ADSL is an exchange access service. By Commission rule, an 'access service' includes 'services and facilities provided for the origination or termination of any interstate or foreign telecommunication. . . ADSL is clearly a 'telecommunications service' that will be used to originate and terminate interstate telecommunications."[25] SBC agreed in its comments on tariffing of BellSouth's DSL service as a special access service.[26]

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[25] *Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Bell Transmittal No. 1986*, CC Docket No. 98-103, Direct Case of Pacific Bell (filed Sept. 11, 1998).

[26] *BellSouth Telecommunications BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476*, CC Docket No. 98-161, Comments in Support of BellSouth's ADSL Tariff (filed Sept. 18, 1998).

In addition, the petitions by incumbent LECs for so-called "forbearance" under Section 706 of the Act also reflect an understanding by incumbent LECs that DSL is a telecommunications service. Section 706 clearly grants the FCC authority to encourage the deployment of advanced *telecommunications* capability. If DSL were not a telecommunications capability as recognized by the incumbents, then the incumbents' efforts to advocate a deregulatory status for DSL under this provision was entirely misplaced.

Finally, the recent regulatory and political wrangling over whether or not the incumbent LECs should have to provide their DSL services in a separate subsidiary also indicates that the incumbents understand DSL to be a telecommunications service.[27] Under Section 272 of the Act, RBOCs seeking to provider interLATA information services must do so in an affiliate. If the incumbents' DSL services were not telecommunications services, but instead were information services, there would be no leeway for political and regulatory give-and-take as to whether or not the incumbents should provide their DSL services in separate subsidiaries.

C. The 1996 Act is Technology-Neutral and Makes No Distinction Between Packet-Switched or Circuit-Switched Technologies

The 1996 Act makes, does not preclude, competitively hamper or favor any one technology over another technology used for telecommunication services. Nowhere does the Act limit regulatory rights or obligations with respect to telecommunications services based on whether those services are provided over packet-switched telecommunications or circuit-switched networks.

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[27] Over the past several months, several competitive carriers have suggested that, while requiring the incumbent LECs to provide their DSL services in a separate subsidiary is not guarantee against anticompetitive behavior, a separate subsidiary requirement would at least provide a meaningful tool to gauge whether or not an incumbent is dealing with competitors on nondiscriminatory terms. Several incumbents have argued that this would force inefficiencies upon their operations and have fought this requirement both at the Commission and on Capital Hill, making the issue in essence a bargaining chip for other incumbent concessions.

1. The 1996 Act is Technologically Neutral By Congressional Intent and Action

Congress expressed exactly the opposite intention with specific indications that the Act and its guarantees should be technology agnostic. Intertwined throughout the Act are repeated acknowledgements by Congress that traditional telephony services were no longer the only telecommunications services, and that in order to remain relevant, the Act must accommodate them. For example, in its directives toward ensuring widespread consumer access to advanced services, the Act defined advanced telecommunications capability as a capability "without regard to any transmission media or technology."[28] As another example, in its requirement that LECs make available subscriber listings under 222(e), Congress gave the caveat that these listings should be available "for the purposes of publishing directories in any format," indicating that a recognition that technological developments would allow listings to become available in a format not in use at the time of the Act.

Indeed, any technologically-narrow reading would be inconsistent with the very purpose of the Act to be the telecommunications edict of the next generation that would allow competitors, regardless of the types of services that they seek to offer, to access the network inputs they need to offer those services on nondiscriminatory rates, terms and conditions. Had Congress not recognized the importance of an expansive view of telecommunications technology, the Act would have been outdated at the moment of its creation. Even packet-switching, which was well recognized at the time of the Act's passage, is now being rivaled by other transmission technologies, such as optical networking. In fact, the only limitation that Congress faced was its inability to use precise verbiage to pinpoint revolutionary, non-traditional telecommunications services that it recognized was on the horizon, but could not detail.

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[28] Section 706(c).

2. This Commission Has Long-Maintained A Technologically Neutral Policy Agenda Consistent With The Principles of the 1996 Act

This technologically neutral position is also consistent with the Commission's previous, pre-Act findings with regard to non-traditional telecommunications technologies, such as packet-switched services. In determining whether or not frame relay services — packet-switched service — are telecommunications services, the Commission found that the question ultimately turned on whether the data on the receiving end is the same as the data on the transmitting end. In applying this principle, the Commission then determined that the classification of frame relay services, and its predecessor X.25 services hinged on the fact that "[u]ltimately the data on the receiving end is the same as what is transmitted," and that it offers a "transmission capability that is virtually transparent in terms of its interaction with customer-supplied data."[29] Accordingly, the Commission found that frame-relay services, another packet-switched technology, and its predecessor X.25, constituted basic telecommunications services and not an information services.

More recently, Congress' intent for neutrality regarding the technology used to provision telecommunications services has been echoed by this Commission. "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[30] Consistent with this finding, in its *Local Competition Order* the Commission determined that it was not up to the incumbent to determine what type of services a competitor can offer utilizing unbundled network elements, but rather, competitors could take the raw materials provided by Congress and utilize those elements via technologies to differentiate their service offerings. Similarly, the Commission concluded in its 1996 *Advanced Services*

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[29] *Independent Data Communications Manufacturers Association, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13721-13722 (1995).

[30] MO&O ¶ 11.

First Report and Order that incumbent LECs could not unilaterally dictate what types of DSL technologies competitors could offer.

3. Modern Uses of DSL Refute Any Attempt to Limit the Scope of Telecommunication Services to Traditional Circuit-Switched Networks

In response to the Commission's determination of that DSL is either telephone exchange service or exchange access service, US West has accused the FCC of "drain[ing] these statutory definitions of any meaning by stretching them to cover new DSL services that are not local, and do not use the PSTN, do not provide universal connectivity within a local exchange, and are not market or functional substitutes for local telephone service."[31] In particular, US West argues that DSL is not a "substitute for local telephone service, such that the DSL price could be a *de facto* basic exchange service charge."[32] US West specifically claims that its DSL services "does not include the pricing of phone service."[33]

This argument by US West is curious, perhaps slightly disingenuous, given the current uses of DSL. What US West has neglected to acknowledge is that some forms of DSL service can allow a customer to rely on that DSL provisioning as their sole incoming line for both voice and data services, and in effect allow the customer to have access to local telephone service. As US West well knows, ADSL technology allows providers to offer both voice and data services on the same DSL-configured line, as the voice and data traffic utilize separate, non-interfering frequencies. Once at the central office, the voice and data traffic are separated, with the voice traffic continuing on into the traditional PSTN, while the data traffic continues onto backbone facilities. Thus, end-users are able to connect to the PSTN via DSL for their voice service needs. Moreover, several incumbent LECs have utilized (and several competitive carriers have sought

[31] Petitioner's Brief at 16.
[32] Petitioner's Brief at 22.
[33] Petitioner's Brief at 22.

to utilize) DSL to provide this capability under an arrangement known as line sharing. In the situation of line sharing, the voice and data channels can be offered by different providers over a single DSL-configured line, again, allowing the end-user full access to the PSTN via DSL services.

US West's argument that DSL is not a substitute for local telephone service because the DSL price is not the *de facto* basic charge and customers "must continue to buy basic local voice telephone service and pay separate charges"[34] is based on fiction. *First*, the itemization of separate basic service and DSL service charges on the customer's bill does not change the fact that the customer in practice is receiving a unified service from US West. Since US West has not yet permitted line sharing, US West voice service is the only voice service that US West DSL customers could be using and thus it is a unified service from the viewpoint of the customer. *Second*, the reality is that the basic voice telephone service charge becomes the *de facto* charge for DSL, and not the other way around. As several incumbent carriers have already made plain, they have not imputed any cost for the data portion into the prices for their interstate ADSL tariffs because the cost of this portion of the loop has already been paid for via voice charges. Thus, it is disingenuous to suggest that because end users may still pay a basic charge, the end user somehow does not view incumbent's ADSL service as providing the best of both worlds — voice and data — over a single line, and at a price that represents only marginal cost increases given the subsidization of data services by voice charges.

Without these technology-specific arguments diverting the Commission's attention from the narrow issue at hand, it is clear that DSL services are a telecommunications service. Because DSL is clearly telecommunications, at a minimum the UNE and collocation provisions of 251

[34] Petitioner's Brief at 23.

are application to incumbent LECs DSL services. Thus, the only real inquiry left for the Commission is whether or not DSL is a telephone exchange service or exchange access service, and thus subject to the interconnection requirements of 251. As discussed in the ensuing sections, DSL is most assuredly an exchange access service.

D. US West's Resurrection of "Information Access Services" Does Not Indicate That Congress Created or Endorsed a Distinct Class of Service Outside the Parameters of Section 251(c)

In its brief to the D.C. Circuit, US West incorrectly asserts that advanced services are "information access services" that lie outside the definition of telephone exchange service and exchange access service.[35] The term "information access services," a relic from the AT&T Modified Final Judgment (MFJ),[36] has no place in the regulation of advanced services under the 1996 Act.

As discussed above, Congress intended that the 1996 Act promote competition among all forms of telecommunications, without limitation to specific forms of telecommunications, with the market-opening provisions of Section 251. Moreover, by its definition, information access falls within the broader category of telecommunications. The MFJ, which established the FCC's long-standing regulatory dichotomy between telecommunications and information services, imposed on the Bells a condition that they provide only telecommunications services — a category which included information access services. The MFJ defines information access as "the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."[37] Information access was the ISP counterpart to exchange access, defined in the MFJ as the

[35] Petitioner's Brief at 28-29.
[36] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

"provision of exchange services for the purpose of originating or terminating interexchange telecommunications."[38] The MFJ specifically permitted the Bells to provide exchange access and information access and specifically prohibited the Bells from providing any other type of service, including information services.[39] Thus, contrary to US West's assertion that "information access" is some other, non-telecommunications form of communication, the MFJ undoubtedly considered information access as within the scope of telecommunications. Were the opposite true, the decision would have included a prohibition on such services. In other words, the MFJ expressly delineated between information services and the facilities over which information services would transmit – the latter being a permissible provision of telecommunications.

In addition, the 1996 Act does not create or delineate a distinct "information access" class of service. Contrary to US West's argument,[40] the single mention of the term "information access" in Section 251(g) does not demonstrate that Congress's omission of that term in Section 251(c) has any bearing on ILEC unbundling obligations for advanced services. US West cites, and accords undue import, to Section 251(g) to demonstrate that Congress expressly differentiates between exchange access and information access for purposes of local competition. That provision, however, states only that

> On or after the enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996.

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[37] *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982).
[38] 552 F. Supp. at 228.
[39] 552 F. Supp. at 227.
[40] Petitioner's Brief at 27.

This language serves only to preserve pre-existing Commission rules such as Open Network Architecture and Comparably Efficient Interconnection rules for enhanced services.[41] Further, this section speaks to unbundling obligations in favor of interexchange carriers and ISPs, not CLECs, and thus lies outside the inquiry of which service providers are entitled to the local competition benefits of Section 251(c). The fact that Congress was careful not to supercede or nullify the FCC's rules for enhanced services, which later were incorporated into the category of information services,[42] does not affect ILEC obligations with respect to telecommunications services.

II. THE COMMISSION HAS AUTHORITY TO INTERPRET THE ACT'S DEFINITION OF EXCHANGE ACCESS

The Act provides two possible avenues through which a service can constitute a telephone exchange service. Telephone exchange services are defined as "service within a telephone exchange, or within a connected system of telephone exchanges within the same area operated to furnish to subscribers intercommuting service of the character ordinarily furnished by a single exchange," or "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[43]

US West has argued that an intercommuting service under the definition of telephone exchange service is inherently associated with a "traditional circuit-switched PSTN" that interconnecting subscribers in a geographic area, and thus excludes DSL, which "avoids the "'circuit-

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[41] "As a first step in implementing Computer III, a BOC was permitted to provide unregulated, 'enhanced' services if it filed a CEO plan demonstrating that the regulated, basic services it used to provide the enhanced services were available to unaffiliated enhanced service providers (ESPs)." *US West Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd. 1195, 1196 (1995).

[42] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905, 21,955-56 (1996).

switched telephone network altogether.'"[44] US West contends that "DSL services do not begin and end 'within' a 'telephone exchange' or set of exchanges in the same local area,"[45] and it is not intercommuting because users have a dedicated pipe that exclusively directs traffic to a specified ISP.[46] Moreover, US West argues that DSL is primarily used for access to the Internet and allows the user to communicate with servers all over the world, which are outside a local exchange area.[47] Finally, US West maintains that DSL does not provide a comparable service because the only type of comparable services would be those that provide "two-way, any-to-any, switched local services."[48]

Rhythms agrees that DSL does not fall under telephone exchange services because it is not a local service. Nonetheless, DSL services are exchange access under the Act. Exchange access service is defined as "access to telephone exchange services *or* facilities for the purpose of the origination or termination of telephone toll services."[49] Telephone toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange services."[50] Thus, it is by definition necessary to extrapolate from these provisions to infer that exchange access includes "facilities for the purpose of the origination or termination of" "telephone service between stations in different exchange areas."

DSL services utilize transmission facilities that both originate and terminate service between end user customers and an ISP's POP or the service provider's central office, and these services are originated and terminated in different exchanges. US West has argued that this

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[43] 47 U.S.C. § 153(47).
[44] Petitioner's Brief at 18-20.
[45] *Id.* at 18-19.
[46] *Id.* at 21.
[47] *Id.* at 19.
[48] *Id.* at 24.
[49] 47 U.S.C. § 153(16).

service does not meet the definition of exchange access services because it is not originating or terminating telephone toll service, with telephone toll service defined as "telephone-to-telephone long-distance calling.[51] US West reaches this definition by interpreting "station" as "simply another word for telephone."[52]

Yet, the Act does not explicitly define station nor does not even hint at a definition of "station," and it is presumptuous in view of this ambiguity for US West to equate its own warped construction of the term with the proper interpretation of the law. Indeed, in the face of such ambiguities, which appear throughout the Act, it is the subject of this Commission's discretion to determine the scope of the term. This authority has been recognized by the Supreme Court in Iowa Utilities, following the Court's recognition that the Act was rife with ambiguity.[53] "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."[54] Accordingly, the Court afforded the Commission wide deference to harmonize these apparent contradictions and add clarity to these ambiguities, as "[Section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[55]

In view of this ambiguity, the Commission should consider the technologically neutral purpose of the Act and the evolving telecommunications market, and decline to limit itself to a

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[50] 47 U.S.C. § 153(8).
[51] Petitioner's Brief at 28.
[52] *Id.* at 28.
[53] *Iowa Utils. Bd.*, 119 S. Ct. at 736.
[54] *Id.*
[55] *Id.*

narrow definition of station as "simply another word for telephone." In today's telecommunications landscape, stations cannot be limited only to telephones, as computers and similar devices make PSTN calls. Indeed, as technology improves, traditional telephone CPE will almost certainly become only one of a multitude of equipment used to connect to the PSTN.

Accordingly, the Commission should recognize that "station" should include any facility used by an end user to receive or originate telecommunications services. Under such a definition, by originating and terminating data and/or voice transmission to and from DSL modems and other customer premise equipment and computers, DSL easily meets the statutory "telephone toll service" language. In short, the Commission has the authority to construe telephone toll service to mean interexchange transport of telecommunications, and need not constrain it, legally or technically, for direct substitutes for circuit-switched long distance telephony using the "traditional" PSTN infrastructure. Thus, the only remaining inquiry is whether or not DSL services are interexchange services, thus fully meeting the definition of telephone toll service. As discussed in full below, the Commission has already correctly reached the conclusion that DSL services are interstate as special access services falling under the category of exchange access.

III. IT IS WELL SETTLED THAT xDSL-BASED ADVANCED SERVICES, AS SPECIAL ACCESS ANALYSIS, ARE EXCHANGE ACCESS SERVICES ENTITLED TO INTERCONNECTION UNDER SECTION 251

DSL-based advanced services are special access services that are eligible for interconnection under Section 251(c)(2) as a form of "exchange access." The Commission has already held, in its review of GTE's DSL services, that DSL services are special access services to be

regulated according to decades-old rules for private line services.[56] These special access services fall within the rubric of exchange access, as do switched access services.[57] Therefore, application of the Commission's long-standing special access rules to DSL-based advanced services — without resort to an "end-to-end" analysis — solve the riddle of labels that US West has posed in its challenge of the *Advanced Services Order*[58] and require the DSL carriers receive interconnection, UNEs and collocation under Section 251 of the Act.[59]

A. DSL Services Are Interstate Special Access Services Subject to Federal Jurisdiction Under the Commission's "Mixed Use" Classification Regime

The Commission has twice held that DSL-based services are special access services that, under the "mixed use" rule, fall within its exclusive jurisdiction.[60] Describing DSL technology as akin to "point-to-point private line service high volume telephony customers purchase for direct access to IXCs' networks," the Commission found that DSL service provide a seamless path between end users "to their selected ISPs" and thus are a form of special access.[61]

The settled "10 percent rule"[62] places DSL services within the jurisdiction of the FCC. In the case of special access services, where the traffic carried along a single line is of "mixed use," meaning both intrastate and interstate in nature, the Commission has classified the service as jurisdictionally interstate and claimed exclusive jurisdiction.[63] Applying a *de minimis* standard to

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[56] *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466, 22,480 (1998), *recon.* 99-41 (rel. Feb. 26, 1999) ("*GTE DSL Order*").

[57] *MTS and WATS Market Structure*, CC Docket 78-72, Memorandum Opinion and Order, 49 Fed. Reg. 7810 (1984), Memorandum Opinion and Order, 48 Fed. Reg. 42,984, 42,985 (1983). *See also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd. 15,499, 15, 15,934 (1996) ("*First Report and Order*").

[58] *Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, Memorandum Opinion and Order, FCC 98-188 ¶ 36 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

[59] 47 U.S.C. § 251(c)(2), (3) and (6).

[60] *GTE DSL Order*, 13 FCC Rcd. at 22,479; *recon.* ¶ 8.

[61] *GTE DSL Order*, 13 FCC Rcd. at 22,480.

[62] 47 C.F.R. § 36.154.

[63] *MTS and WATS Market Structure*, 4 FCC Rcd. 5660 (1989)(referring specifically to the costs of providing "mixed use" special access as an interstate matter).

"mixed use," the Commission has held that facilities carrying even a minimum amount of interstate traffic, designated at 10% of traffic on a single line, are interstate communications facilities.[64] As the Commission has found, interstate Internet traffic is the predominant purpose for DSL-based services.[65] Therefore, the Commission has properly asserted jurisdiction over DSL-based advanced services and has ordered ILECs to provide open network access to DSL providers under Section 251.

Special access services are a form of exchange access services. Access services in fact comprise two categories: special access services and switched access services.[66] The Commission recognized these services as being exchange access services in the *First Report and Order*, stating "incumbent LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services, and that end users do occasionally purchase some access services, including special access."[67] Moreover, as a matter of network operations, these services each provide the same functionality: transporting telecommunications or information services from the end user to the network for intraexchange or interexchange communications. Special access services, being a dedicated connection to an IXC or ISP POP, carry telecommunications from the end user to network for interexchange communications having either an intrastate or an interstate destination. Thus, according to basic concepts of network architecture, xDSL-based advanced services are plainly exchange access services.

Not only has the Commission reached this conclusion as a legal matter, but the behavior and argumentation from the ILECs themselves compels this conclusion. ILECs have already asserted that they believe that DSL services are not only telecommunications, but are exchange ac-

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[64] *Id.*

[65] *GTE DSL Order*, 13 FCC Rcd. at 22,478.

[66] *Access Charge Reform,* Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, CC Docket No. 96-262, FCC 96-488, ¶ 24 (rel. Dec. 24, 1996).